

TAISHO COMPANY SDN BHD

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v.

PAN GLOBAL EQUITIES BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR

b

SHAIK DAUD ISMAIL JCA

ABU MANSOR ALI JCA

HAIDAR MOHD NOOR JCA

[CIVIL APPEAL NO: P-02-64-96]

30 DECEMBER 1998

c

CIVIL PROCEDURE: *Pleadings - Amendment - Leave to amend statement of claim - Prerequisites - Principles underlying powers of court to amend pleadings - Application for leave to amend after expiry of relevant period of limitation - Whether unjust to grant leave to amend - Delay - Lack of bona fide - Effect of - Rules of the High Court 1980, O. 20 r. 5(2) & (5)*

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WORDS & PHRASES: *“Prejudice” - Meaning of*

In May 1991 the appellant filed a loan recovery action against the respondents. The appellant thereafter obtained an order to strike out the respondents’ defence, but failed to get the order affirmed by the Court of Appeal presumably upon the defence of limitation raised by the respondents. In May 1995, in an effort purportedly to overcome the defence of limitation, the appellant applied to amend para. 5 of its statement of claim, proposing to insert thereto the phrase “The said loans and the interest payable thereon were acknowledged by the first and the second defendants as late as April 1987”. The learned High Court judge concluded, on the facts, that the appellant was guilty of delay, as, having had knowledge of the ‘acknowledgement’ since April 1987, it was unreasonable of the appellant to have filed the application to amend only in 1995, ie, four years after filing the action in 1991. In the circumstances, the learned judge, whilst admitting that the facts of the case remained the same or substantially the same, ruled nonetheless that it was not in the interest of justice to allow the application to amend. The application to amend was thus dismissed whereupon the appellant appealed.

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a Held:

Per Haidar Mohd Noor JCA

- b** [1] A party seeking to amend under O. 20 r. 5(2) & (5) Rules of the High Court 1980 ('RHC') must satisfy two requirements, namely (i) that the cause of action arises out of the same or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action, and (ii) that it is just to grant leave to make the amendment.
- c** [1a] The correct test to determine condition (i) is 'whether there is a sufficient overlap between the facts supporting the existing claim and those supporting the new claim'. As for condition (ii), the fact that the party opposing the amendment would be deprived of an accrued right of limitation is a factor that ought to be taken into account, but such fact does not *ipso facto* mean that the amendment would be unjust to the opposing party. It is also true, in this respect, that
- d** any consideration of whether it would be unjust to grant leave to amend requires the balancing of the applying party's need to amend and the prejudice to the opposing party's interest.
- e** [2] In the instant case, the application was made after the appellant failed on appeal to the Court of Appeal to affirm the judgment entered by it initially. The appellant also had knowledge of the 'acknowledgement' as late as April 1987, but only filed the application in 1995 ie, four years after the commencement of the action, and no reasons were given for the delay. These apart, the
- f** application also borders on lack of *bona fide* on the appellant's part.
- [3] The appellant had satisfied the first condition aforesaid, but not the second condition. However, as the appellant had failed in one, it must fail altogether. The learned judge, in the circumstances, had correctly considered the two requirements or conditions envisaged under O. 20
- g** r. 5(2) & (5) RHC and had also exercised his discretion judicially.

[Appeal dismissed.]

[Bahasa Malaysia Translation Of Headnotes]

- h** Pada bulan Mei 1991 perayu telah memfailkan satu tindakan menuntut hutang terhadap responden. Pelayu kemudian memperolehi perintah untuk mengenyepikan pembelaan responden, tetapi gagal mempertahankan perintah tersebut di hadapan Mahkamah Rayuan ekoran pembelaan hadmasa yang dibangkitkan oleh responden. Pada bulan Mei 1995, dalam usahanya untuk
- i** mengatasi pembelaan hadmasa, perayu memohon untuk meminda perenggan

5 penyata tuntutan, di mana ia bercadang untuk memasukkan ke dalam ungkapan “Hutang tersebut serta faedah yang kena bayar di atasnya telah diakui oleh defendan pertama dan kedua selewat April 1987”. Hakim Mahkamah Tinggi yang bijaksana merumuskan, di atas fakta, bahawa perayu bersalah kerana kelewatan, oleh kerana, setelah mengetahui tentang ‘pengakuan’ sejak April 1987, tidak munasabah bagi perayu untuk memfailkan permohonan untuk meminda hanya pada tahun 1995, iaitu empat tahun selepas pemfailan tindakan dalam tahun 1991. Dalam halkeadaan sedemikian, hakim yang bijaksana, walaupun mengakui bahawa fakta kes adalah sama atau sebahagian besarnya sama, telah memutuskan bahawa adalah tidak selari dengan kepentingan keadilan untuk membenarkan permohonan untuk meminda. Permohonan perayu dengan itu ditolak dan perayu merayu.

Diputuskan:

Oleh Haidar Mohd Noor HMR

- [1] Mana-mana pihak yang berhasrat untuk meminda di bawah A. 20 k. 5(2) & (5) Kaedah-kaedah Mahkamah Tinggi 1980 perlu memenuhi dua syarat, iaitu (i) bahawa kausa tindakan yang berbangkit hendaklah sama atau sebahagian besarnya sama dengan kausa tindakan yang berbangkit di mana relif telah dituntut di dalam tindakan, dan (ii) bahawa ianya adil untuk memberi kebenaran untuk membuat pindaan.
- [1a] Ujian yang betul bagi menentukan syarat (i) ialah ‘samada wujud pertindihan yang mencukupi di antara fakta yang menyokong tuntutan semasa dan fakta yang menyokong tuntutan yang baru’. Berhubung syarat (ii), fakta bahawa pihak yang menentang pindaan akan dilucutkan dari hak hadmasa yang terakru kepadanya adalah satu faktor yang perlu diambilkira, tetapi fakta sedemikian tidaklah *ipso facto* bermakna bahawa pindaan akan menjadi tidak adil kepada pihak yang menentang. Ianya juga benar, dalam hubungan ini, bahawa apa jua pertimbangan berhubung samada ianya tidak adil untuk memberi kebenaran untuk meminda memerlukan peneracaan keperluan pihak yang memohon untuk meminda dan prejudis kepada kepentingan pihak yang menentang.
- [2] Dalam kes semasa, permohonan telah dibuat selepas perayu gagal dalam rayuan di Mahkamah Rayuan untuk mengesahkan penghakiman yang diperolehi pada awalnya. Perayu juga mempunyai pengetahuan tentang ‘pengakuan’ selewat April 1987, tetapi memfailkan permohonan hanya pada 1995, yakni selepas empat tahun memulakan tindakan, dan tiada alasan diberi atas kelewatan tersebut. Selain itu, permohonan juga menampakkan ketiadaan *bona fide* di pihak perayu.

- a** [3] Perayu telah memenuhi syarat pertama di atas, tetapi tidak syarat kedua. Bagaimanapun, oleh kerana perayu gagal dalam satu ia semestinya gagal kesemuanya. Hakim yang bijaksana, dalam halkeadaan yang wujud, telah mempertimbangkan kedua-dua syarat seperti yang ternyata dalam A. 20 k. 5(2) & (5) dan telah juga
- b** melaksanakan budibicaranya mengikut undang-undang.

[Rayuan ditolak.]

Cases referred to:

- Hock Hua Bank Bhd v. Leong Yew Chin* [1981] 1 MLJ 231 (*refd*)
- c** *Lim Yong Swan v. Lim Jee Tee & Anor* [1993] 1 SLR 500 (*fol*)
- Multi-Pak Singapore Pte Ltd v. Intraco Ltd & Ors* [1992] 2 SLR 793 (*refd*)
- Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191 (*refd*)

Legislation referred to:

- d** Rules of the High Court 1980, O. 18 r. 19, O. 20 r. 5(2), (5)

Other source referred to:

- Supreme Court Practice 1991 & 1997*, para 20/5 - 8/7
- For the appellant - Dr Jagjit Singh Sidhu; M/s Lim Kean Siew & Co*
- For the respondent - YK Leong; M/s Riza Leong & Partners*
- e** *[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-141-1991]*
- Reported by WA Sharif*

JUDGMENT

- f** **Haidar Mohd Noor JCA:**

The appellant ("plaintiff") filed an application before the senior assistant registrar for amendment of para. 5 of its statement of claim. The application was dismissed. The appellant appealed to the judge-in-chambers.

- g** The learned judge dismissed the appeal. The appellant filed an appeal to this court against the decision of the learned judge.

The application for amendment of para. 5 of the statement of claim was made pursuant to O. 20 r. 5 of the Rules of the High Court 1980 ('RHC').

- h** The proposed amendment reads:

The said loans and the interest payable thereon were acknowledged by the First and the Second Defendants as late as April 1987.

- i** Before considering the issue as to whether the application was properly dismissed, it would be appropriate to set out the background facts that led to the application by the appellant.

Background

The appellant filed this action on 29 May 1991. This action relates to loans of RM1,060,000 to the first respondent and RM500,000 to the second respondent. As at 31 December 1990, the first respondent was indebted to the appellant in the sum of RM3,688,370.90 and the second respondent was indebted in the sum of RM1,822,276.44, both inclusive of interest. It seemed the appellant is an associate company of the respondents by reason of being a minor shareholder.

On 16 September 1992 the appellant filed a summons-in-chambers to strike out the defence of the respondents pursuant to O. 18 r. 19 of RHC. It was allowed. The respondents appealed to this court. The appeal was allowed on 27 October 1994 (Civil Appeal No. P-02-168-94) though counsel for the appellant contended that the date was wrongly stated by the learned judge and the correct date should be 4 May 1995.

On 5 May 1995, the appellant filed an application to amend para. 5 of its statement of claim. It was dismissed by the senior assistant registrar and on appeal to the judge-in-chambers, the order of the senior assistant registrar was affirmed. Hence the present appeal before us.

The Amendment

According to the learned judge, in spite of the defence of limitation, he still allowed the application of the appellant to strike out the defence and gave judgment to the appellant. However, on appeal, this court set aside the order of the learned judge. In other words, the action should proceed to trial.

It seemed clear, according to the learned judge, that the amendment was to add a new cause of action to overcome the defence of limitation, the ground on which it earlier failed in the appeal before this court (see p. 18 of the Appeal Record).

The learned judge stated that the application to amend was filed four years after this action was filed and the “acknowledgement” said to have been made at the latest on April 1987, was four years before proceeding to file this action. In the circumstances the learned judge was of the view that it was not in the interest of justice to allow the application to amend and dismissed it with costs.

The issue hinges on the interpretation of O. 20 r. 5. This rule is in *pari materia* with the English rule of court and similar to the Singapore rule of court and reads:

- a** 5. Amendment of writ or pleading with leave (O. 20 r. 5)
- (1) Subject to Order 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner
- b** (if any) as it may direct.
- (2) Where an application to the Court for leave to make the amendments mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph **if it thinks it just to do so.**
- c**
- (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was
- d** not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under
- e** paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.
- (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new
- f** cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment. (emphasis added,)
- The rationale behind O. 20 r. 5 is explained by the editors of the Supreme
- g** Court Practice 1997 at para 20/5-8/7 and read:
- The principle underlying the powers of the court under r. 5 is that if the proceedings had been, from the beginning, properly formulated or constituted in the circumstances specified in paras (3), (4) and (5) the
- h** defence of limitation would not have been available to the defendant; and accordingly, if in its discretion, the court thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances in these paras, so that such defects in the proceedings are treated as having been cured *ab initio*, the defendant is not being deprived of the benefit of a defence which he would have had if the proceedings had been so properly
- i** formulated or constituted in the first place. To contend in the cases specified

in the paras, that the defendant has an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the court will not use its powers to amend under O. 20 r. 8, and O. 15 rr. 6, 7 and 8 (see *per* Holroyd Pearce LJ in *Pontin v. Wood* [1962] 1 QB 594, 609; [1962] 1 All ER 294, 298). a

The above passage appeared in para 20/5 - 8/7 of the Supreme Court Practice 1991 and quoted by Yong Pung How, CJ, in the Singapore Court of Appeal case of *Lim Yong Swan v. Lim Jee Tee & Anor* [1993] 1 SLR 500 at p. 508. b

In the result, Yong Pung How, CJ, on the same page stated thus: c

A party seeking to amend under O. 20 r. 5(5) must therefore show:

(1) that the cause of action arises out of the same or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action, and

(2) if the court thinks it just to grant leave to make the amendment. d

As to condition (1), we were in agreement with counsel for the respondents that the correct test was that set out in the case of *Steamship Mutual Underwriting Association Ltd v. Trollope & Colls (City) Ltd* [1986] 33 BLR 77, and approved in *The 'Casper Trader'* [1991] 2 Lloyd's Rep. 237: whether there is a sufficient overlap between the facts supporting the existing claim and those supporting the new claim. e

The learned judge in his judgment answered in the affirmative as to condition (1), as posed by Yong Pung How CJ. The same view of the rule [condition (1)] was taken by the Supreme Court in *Hock Hua Bank Bhd v. Leong Yew Chin* [1981] 1 MLJ 231 and quoted with approval by Yong Pung How CJ in *Lim Yong Swan*. We accepted the finding of the learned judge that condition (1) had been satisfied by the appellant. f

As to the scope of condition (2) Yong Pung How CJ in *Lim Yong Swan* stated at the same page: g

Clearly, the fact that the party opposing the amendment would be deprived of an accrued right of limitation would not itself make it unjust to give leave to amend. **It is one of the factors that can be taken into account.** The purpose of paras (2) to (5) was to remove that reason as an absolute bar and we have already set out the rationale behind the introduction of the paragraphs stated in the Supreme Court Practice. Accordingly, we did not accept counsel for the appellant's submission that the fact that the action was time-barred meant *ipso facto* that any amendment would be unjust to the appellant. (emphasis is ours) h

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- a* The learned CJ of Singapore in agreeing with the view of Webster J in *The 'Casper Trader'* stated:

When *The 'Casper Trader'* was before the judge-in-chambers, Webster J expressed the view that consideration of whether it would be unjust to grant leave to amend under para (5) required a balancing of the applying party's need to amend and the prejudice to the opposing party's interest. 'Prejudice' in this context, in the opinion of the learned judge, meant at page 243:

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- c* For the purpose of answering this question I do not think it relevant simply to consider whether the defendants will or may have difficulty in defending the claim, specifically at the trial. In my view for any relevant prejudice to be found it must constitute prejudice resulting from the amendment, either in the sense that the defendants, in reliance on the claim originally made, altered their position so as to make it more difficult to defend the new claim now made or in the sense that it will be more difficult for them to defend the claim than it would have been had the claim been brought within the period of limitation.
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- e* GP Selvam JC, in *Multi-Pak Singapore Pte. Ltd. (in receivership) v. Intraco Ltd & Ors.* [1992] 2 SLR 793 in considering the true construction of O. 20 r. 5(2) and (5) stated at p. 802, "a plaintiff seeking an order under it must satisfy two requirements: (a) that the facts of the case remain the same or substantially the same; and (b) that the justice of the case is with him. If he fails in one, he fails altogether. As the power conferred on the court is discretionary, the court considering the application should adopt a broad common sense approach."

- f* The learned JC went on further to state at p. 803:

Even if the plaintiffs had complied with the first requirement, they had not shown that it would be just to grant them the application. A party asking the court to exercise a discretionary power in his favour must place some material and advance some cogent reasons to impel the court to lean on his side: see *Ratnam v. Cumarasamy* [1965] 1 WLR 8.

- g*
- The judgment of the learned JC was affirmed by the Court of Appeal (see [1993] 2 SCR 113).

- h* The two requirements stated by the learned JC are similarly covered by our O. 20 r. 5(2) and (5). The learned CJ of Singapore in *Lim Yong Swan* on the other hand described the two requirements as conditions. It makes no difference as it is a matter of choice of words. We therefore could not possibly see anything wrong in the learned judge relying on the Singapore cases for guidance in the construction of our O. 20 r. 5(2) and (5).

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In *Yamaha Motor Co. Ltd v. Yamaha Malaysia Sdn. Bhd & Ors* [1983] 1 CLJ 191; [1981] 1 MLJ 213 the Federal Court went on further to state that three basic questions should be considered to determine whether injustice would or would not result in considering the application for amendments. One of the basic question is whether the application was *bona fide*. a

The learned judge intimated that the application was made after the appellant failed on appeal to this court to affirm the judgment entered by it initially. Further, he said that the appellant had knowledge of the “acknowledgement” as late as April 1987, that is, four years before the action was filed. Furthermore, the application was filed four years after the commencement of this action. We would add further that no reasons were given for the delay in filing the application when the point of admission was obviously available even before filing the proceedings. As rightly opined by the learned JC in *Multi-Pak Singapore Pte. Ltd.* and correctly followed by the learned judge, the appellant did not place some material and advance some cogent reasons to impel the court to lean on its side. We would further add that the application borders on lack of *bona fide*, one of the basic question set out in *Yamaha Motor Co. Ltd*. b

The learned judge was of the view that condition (2) had not been satisfied by the appellant, that is, it would be just to grant leave to amend. c

We were of the opinion that the learned judge had correctly considered the two requirements or conditions envisaged under O. 20 r. 5(2) and (5) of RHC. In the circumstances he had exercised his discretion judicially. As the appellant failed in one, it failed altogether. There were no good grounds for us to interfere. d

The appeal was dismissed with costs. The deposit ordered to be paid to the respondents to account of taxed cost e

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